

COMPLIANCE BOARD OPINION NO. 03-19

August 20, 2003

Mr. Brian Gnatt, Editor
Mr. Thomas Grant, Managing Editor
Poolesville Gazette

The Open Meetings Compliance Board has considered your complaint that the Poolesville Town Commissioners violated the Open Meetings Act by holding an illegally closed meeting on May 19, 2003, and by failing to provide sufficient information prior to closing the meeting of May 5, 2003. For the reasons stated below, the Compliance Board finds that the May 19 meeting was permissibly closed on the basis of one exception in the Act, but the Commissioners violated the Act by citing a second, inapplicable exception. The Complaint Board is unable to express an opinion on the adequacy of the statement prior to the closing of the May 5 meeting.

I

May 19 Meeting

A. Complaint

The bulk of the complaint concerned the meeting on May 19, 2003. Citing the agenda for the May 19 meeting, the complaint pointed out that the Commissioners had originally intended to discuss at its open session “the performance and potential renewal of a contract for Maryland Environmental Services (MES), which is the company contracted by the Town to operate its wastewater treatment plant” This was to be done, according to the agenda, as part of the Town Manager’s report. At the May 19 meeting, however, the Commissioners decided to discuss this matter in closed session. The cited grounds for closing the meeting were §10-508(a)(7) of the Act,¹ which allows a public body

¹ All statutory references in this opinion are to the State Government Article, Maryland Code.

to close a session in order to “consult with counsel to obtain legal advice,” and §10-508(a)(14), which allows a closed session for certain procurement matters.²

The complaint alleged that neither of these exceptions applied to the matter discussed on May 19. “A report from the town manager about the past performance of a contractor has nothing to do with consulting the town attorney or ‘negotiating a strategy or the contents of a bid or proposal.’” The complaint cited the minutes of the closed session in support of the contention that the Town Attorney did not provide legal advice to the Commissioners. In addition, the complaint argued that §10-508(a)(14) did not apply, because the Town of Poolesville was not engaged in a competitive bidding or proposal process. “The town did not put a contract out for bid, but instead decided to end its relationship with MES and operate the wastewater treatment plant itself.”

B. Response

In a timely response on behalf of the Poolesville Town Commissioners, Charles S. Rand, Esquire, Town Attorney, denied that the Act had been violated. The response agreed that the agenda for the open session on May 19 had listed a discussion of the Town Manager’s report concerning MES, focusing on the contractor’s performance and possible renewal of the contract for the next fiscal year. The response presented as follows the reasons for, and discussion in, the closed session:

The [Town Attorney], having reviewed the contract prior to the meeting, noted that the Town was inside the sixty-day notice period for termination of the contract for the following thirteen months. The contract also contained a provision for cancellation for cause, and the Town Manager’s report for this contractor indicated that its performance could conceivably merit termination under this provision. The purpose of the discussion [in closed session], therefore, was to give the Commissioners of Poolesville advice regarding which, if either, provision might be available, and for them to evaluate whether and how they wished to terminate the contract, as well as to weigh the advice given regarding

² This exception allows a public body to meet in closed session, “before a contract is awarded or bids are open, [to] discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.”

the Town's exposure to damages in the event that termination was elected.

The legal advice given concerned a discussion of whether the Town would be in breach of either termination provision if it cancelled. This, in turn, necessarily lead to the Town Attorney's evaluation of whether either cancellation clause could apply to the current situation, and if not, what exposure to damages would the Town undertake. This advice had to include a discussion of the Town Manager's performance report as to termination for cause.

The Commissioners listened to the advice given and decided to request more detailed information before making a decision as to how to proceed: that was the Town Attorney's more formal evaluation of the Town's exposure to damages, and the Town Manager's preparation of a feasibility report of Town takeover and the budget, all to be submitted by the following Friday, at which time a decision was contemplated.

The advice from the Town Attorney was said to be "the entire cause of the discussion, from start to finish."

According to the response, the other exception, for competitive procurement matters, "was only listed out of an abundance of caution. In this case, had the Commissioners determined to extend or terminate the contract, the question of bidding or awarding the extension for the work may well have followed (it did not). However, had it done so, it would have been a discussion arguably within this exception. Since it was not discussed, the reference to this section is superfluous."

C. *Analysis*

In one of his more sentimental poems, Oliver Wendell Holmes began a stanza with the line, "There are no times like the old times – they shall never be forgot!"³ Holmes might as well have been writing about the Open Meetings Act in Poolesville: The very first opinion of the Compliance Board in part concerned the application of the legal advice exception to a discussion about a contract related to the wastewater treatment plant. Compliance Board Opinion 92-1 (October 15,

³ Oliver Wendell Holmes, "No Time Like the Old Time," *The Poetical Works of Oliver Wendell Holmes* 222 (1895, reprinted 1975).

1992), *reprinted in 1 Official Opinions of the Maryland Open Meeting Compliance Board* 1.

As we then observed, the exception in §10-508(a)(7) “is to be narrowly construed to cover only the interchange between the client public body and its lawyer in which the client seeks advice and the lawyer provides it.” At that time, we concluded that “the Town Commissioners’ consultation with the Town Attorney regarding the bid process concerning the wastewater treatment plant was within the narrow scope of the exception.” We also pointed out “that legal issues often cannot be addressed without a clear understanding of the facts”

The Commissioners have sufficiently justified their invocation of the legal advice exception at the May 19 meeting. Sometimes a public body may not realize that it needs legal advice until its attorney points out the legal issues requiring consultation. The Town Attorney did so with respect to possible termination of the contract with MES, and the Commissioners, by closing the meeting to hear from the Town Attorney, implicitly concurred that they wanted his advice on this subject. The Town Manager’s report about MES’s performance was undoubtedly related to the legal risk assessment that was at the core of the Town Attorney’s presentation in closed session. This was a proper invocation of the exception, and there is no evidence that the discussion in closed session exceeded the bounds of the exception. Consequently, we conclude that the Town Commissioners complied with the Open Meetings Act in their reliance on §10-508(a)(7) to close the meeting on May 19.

We do not countenance, however, the Commissioners’ invocation of the competitive procurement exception, §10-508(a)(14), as justification for closing the session. This exception only applies to the direct preparation for, or conduct of, a competitive bidding or proposal process. It does not cover negotiations generally. Compliance Board Opinion 97-8 (May 14, 1997), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 233.

No such process was involved with MES, and it would stretch the exception beyond the bounds of its narrow construction were we to accept the Town Attorney’s speculation that the termination of the contract might ultimately lead to such a process, which might have then been discussed at the May 19 meeting. We disagree with the Town’s contention that, even if the exception were deemed inapplicable, its invocation was merely “superfluous.” The Act requires a public body to vote on the invocation of specific exceptions and its presiding officer to identify them in writing. These requirements seek to produce a public body’s thoughtful consideration whether the reasonably anticipated discussion fits within the cited exceptions. Exceptions are not to be invoked without a bona fide basis.

Consequently, the Commissioners violated the Act by citing §10-508(a)(14) in closing the meeting.⁴

II

May 5 Meeting

A. Complaint

The complaint's second allegation related to the Commissioner's alleged practice of "routinely cit[ing] the boilerplate 'personnel issue' exclusion as the reason to close a meeting while not elaborating on topics to be discussed as required by the Open Meetings Act." The complaint gave as an example the meeting on May 5, 2003, at which the Commissioners allegedly failed to list the topics to be discussed in the closed session, as required by the Act.

B. Response

With respect to disclosure about the personnel matter considered at the May 5 meeting, the response noted that "the subject was with regard to one specific person, the Town Attorney, and whether his performance (with other factors) should lead the Commissioners to put the job out to bid. ... It should not be necessary to name the particular individual, thereby subjecting him/her to a public spotlight prematurely where none might be justified or forthcoming." The response argued that the minutes for this closed session, which indicated that the Commissioners had "discussed the Town Attorney's contract renewal [and] decided that they would advertise and receive bids for the position," satisfied the Act's requirements.

C. Analysis

We do not understand the complaint as objecting to the fact that the Commissioners closed the May 5 meeting to discuss performance issues related to the Town Attorney. Discussion of a performance of an appointee is squarely within

⁴ If, contrary to both reasonable expectation and actual events, discussion in closed session had turned to the nature of a competitive procurement process following the termination of the MES contract, the Commissioners would have been free to reconvene in open session, properly invoke §10-508(a)(14), follow the Act's other procedures, and close the meeting.

the exception.⁵ Rather, the gist of the complaint appears to be the Commissioners' alleged failure to comply with one of the Act's procedural requirements – namely that, as a prerequisite to meeting in closed session, the presiding officer is to “make a written statement of the reason for closing the meeting, including the citation of the authority under the section, and a listing of the topics to be discussed.” §10-508(d)(2)(ii).

This statement of the topic need not identify the individual whose performance is being evaluated, but the Act requires more than a simple citation of the statutory authority. A personnel-related topic usually can be described in a way that does not reveal the identity of the individual (for example, “discussion of performance appraisal of a public works department employee,” if the public works department has many employees).

In this situation, of course, a topic description along the lines of “performance evaluation of the Town Attorney” is tantamount to naming the individual. Therefore, the presiding officer would have complied with his obligation had the written statement merely included a reference to the topic of “performance evaluation of an individual.” Likewise, if the information subsequently disclosed in the minutes of the May 5 meeting had appeared in a written statement prepared prior to the meeting, compliance would have been sufficient. Instead of indicating that a performance evaluation of the Town Attorney was underway, the Commissioners noted that their discussion concerned the Town Attorney's contract renewal. Under the circumstances, this recitation of the topic of meeting would have been sufficient.

Because we have not been provided with the written statement, however, we express no opinion on the Town's compliance with this procedural requirement

⁵ The specific personnel exception, §10-508(a)(1), encompasses “the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees or officials over whom [a public body] has jurisdiction” and, more generally, “any other personnel matter that affects 1 or more specific individuals.”

III

Conclusion

In summary, the Open Meetings Compliance Board finds that the Commissioners of Poolesville lawfully closed the meeting on May 19 under the exception applicable to legal advice. The Commissioners violated the Open Meetings Act by improperly invoking the exception for competitive procurement discussions prior to closing the May 19 meeting. The Compliance Board expresses no opinion about the adequacy of the written statement prepared by the presiding officer prior to the closing of the May 5 meeting, although the Compliance Board notes that the personnel exception justified the closing of the meeting and that the description of the meeting's topic in the subsequently disclosed minutes would have been sufficient had it appeared in the written statement prior to the meeting.

OPEN MEETINGS COMPLIANCE BOARD

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